IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-1460

RICHARD L. DUGGER,
Secretary, Florida Department
of Corrections and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Petitioners,

vs.

LENSON HARGRAVE,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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# BRIEF OF RESPONDENT IN OPPOSITION

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## BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Lenson Hargrave, files this brief in opposition to the petition for writ of certiorari filed by petitioners Richard L. Dugger and Robert A. Butterworth in this cause.

## STATEMENT OF THE CASE

Respondent's statement of the case will be limited to a recitation of pertinent factual aspects of the proceedings which are omitted from the statement of the case in the petition.[1]

At the outset of the jury-sentencing hearing on July 15, 1975, the trial judge instructed the jury as follows:

> During the hearing, you will receive evidence and testimony concerning certain aggravating or mitigating circumstances.
> Following this presentation . . . you will retire to consider rendering to this Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, whether sufficient mitigating circumstances exist or outweigh any aggravating circumstances found to exist. . . .

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[1] The symbol "PA" will designate petitioners' appendix and the symbol "RA" will designate respondent's appendix.

(PA 119-20).[2] The court then listed the aggravating circumstances set forth in Section 921.141(5), Florida Statutes (1985), introducing the roster by stating to the jury that "aggravating circumstances shall be limited to the following . . . ." (PA 120). The roster of mitigating circumstances in Section 921.141(6), Florida Statutes (1975), was introduced as follows: "The mitigating circumstances which you may consider, if established by the evidence, are as follows . . . ." (PA 122).

The prosecution's lead witness, Dr. Robert Sylvester, testified to respondent's "dull-normal to normal" intelligence level,[3] "impairment" due to drug usage, possible brain damage, and "personality problems . . . of a major dimension" (PA 132-37). The prosecutor elicited from the doctor testimony that respondent did not suffer from any psychotic disorders and that respondent had not been dominated by the codefendant Karge during the incident (PA 138, 142).[4]

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2 During jury-selection proceedings, the court had explained the Florida capital-sentencing structure as follows:

> The law sets forth certain factors which the jury must take into consideration, and at that stage of the proceedings, the court supplies the jury orally and in writing with what are called aggravating circumstances which are listed in the law and mitigating circumstances, certain other circumstances that are listed in the law. . . . The judge then makes a decision as to these mitigating circumstances and aggravating circumstances with the help of the recommendation of the jury and the judge makes the final decision on the death penalty or life imprisonment.
>
> * * *
>
> . . . The decision of the jury as to life or death is not just an arbitrary one, but you are supposed to consider certain factors, and reach a recommendation based on what you find those factors to be.

(RA 3-4).

3 Respondent, who had been 18 years of age at the time of the offense and was 19 years old at the time of trial, was described by the witness as having a mental age of 16 to 17 years (PA 131-32).

4 The prosecution also introduced the testimony of two lay witnesses: Joy Simn, the fiancee of the codefendant Karge, and Janice Fraker, the girlfriend of Terry Morton, an informant who (Cont'd)

Dr. William Corwin, a psychiatrist, testified on behalf of respondent (PA 208-09). Counsel elicited from Dr. Corwin that respondent suffered from a "personality disorder" of "lifelong duration," which disorder was typified by drug usage and impulsivity (PA 211-14). Counsel then elicited that respondent "felt that people took advantage of him." (PA 215). This questioning laid the groundwork for counsel's ultimate question of the witness, with which he brought forth the doctor's opinion that respondent "could be dominated" by other people (PA 216-17). Counsel next called respondent's mother, who testified that she had been aware of respondent's close relationship with the codefendant Karge, and that Karge had been "a magnet," drawing respondent away from her (PA 218-20).

In his closing argument, the prosecutor told the jury, after reviewing the list of aggravating circumstances (PA 229-34), that "[y]ou're going to be instructed as to certain mitigating circumstances that you should look for, and if present, apply and weigh . . . ." (PA 234). He then listed the mitigating circumstances specified in Section 921.141(6), Florida Statutes (1975) (PA 234-40). Counsel for respondent, in his closing argument, characterized respondent as a "defective child," referred to the Greek city-state of Sparta, and depicted the jury's responsibility as being to determine whether "it's time to return to Spartan tactics and put this kid on an electrically charged plain and leave him there to die." (PA 241-43). He argued to the jury respondent's "dull-normal intelligence," the emotional problems which "render[ed] him unable to deal normally with society," as testified to by Dr. Sylvester, and that respondent's "condition is such as to render him . . . susceptible to being dominated" by the codefendant (PA 243-45). Based upon the testimony of Dr.

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had provided information to the police regarding the offense in this case (PA 193-207). These witnesses testified that respondent, prior to his arrest, had admitted his responsibility for the homicide, and had stated that "it wouldn't bother him to kill again" and that "he would do it again if anyone was to be in his way." (PA 196, 202). Objections to this testimony were overruled on the ground that it was being introduced only to rebut the statutory mitigating circumstance that respondent had "acted under the substantial domination of another person," see § 921.141(6)(e), Fla.Stat. (1975), the codefendant Karge (PA 189-92).

Corwin and respondent's mother, counsel further argued that respondent had in fact been under the domination of the codefendant at the time of the homicide (PA 245-49). Counsel also argued that respondent could be treated for his problems if given a life sentence, and that the balancing of aggravating and mitigating circumstances did not support imposition of the death penalty (PA 250-52).

The trial judge instructed the jury that its advisory verdict should "be based upon the facts as you find them from the evidence and the law as given you by the Court in the charges preceding and following the sentencing hearing." (PA 253-54). The court did not reinstruct the jury on the aggravating and mitigating circumstances, but stated that the verdict was to be based upon a weighing of the previously-enumerated circumstances (PA 254). The jury subsequently returned a verdict recommending imposition of a death sentence (PA 256-57).

At the conclusion of the jury proceedings, counsel requested the court to order a presentence investigation (PA 263). The court deferred ruling on the request, but noted its opinion that "there is very little, if any of the ordinary presentence report that would be relevant to what the jury and the Court are supposed to consider in this matter concerning mitigating and aggravating circumstances." (PA 265-66). The motion was renewed at the final sentencing hearing on July 18, 1975, and respondent's counsel, in arguing that that a presentence investigation should be ordered and/or a life sentence imposed, stated that "while the legislature has promulgated a list of six mitigating circumstances, the list of aggravating circumstances numbers seven, which gives rise to the appearance . . . that the criteria for determining the imposition of capital punishment are weighted against the defendant." (PA 274). In opposition, the prosecutor argued that the court was "bound by the criteria outlined in the statute as to the aggravating and mitigating circumstances," and that a presentence investigation "would not serve any purpose, because I don't believe the Court can go outside of those criteria." (PA 275). Respondent's counsel did not take issue with

the prosecutor's characterization of the permissible mitigating circumstances, asserting in response that such an investigation might uncover statutory mitigating circumstances (PA 276). The court denied the motion, ruling that both it and the jury could only consider "certain factors" in imposing sentence, and that a presentence report would be irrelevant to those factors (PA 276-77).[5]

The court prefaced its announcement of the death sentence by stating its belief that the Florida statute had established "certain standards to be considered by the jury and the Court," and that "the object of it was to eliminate as much as possible the individualistic characteristics and personalities of the various defendants . . . so that the jury and the Court would render an opinion and finding that was based upon standards." (PA 298). The sentencing order entered by the court states that, "as required by Florida Statute 921.141(3)," the court was submitting "its written findings upon which the sentence of death is based." (RA 5).[6]

The court's order, in analyzing mitigating circumstances,

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5 Counsel then asked the court if it would permit members of respondent's family to "address brief comments to the Court before sentence is passed" (PA 278-29), advising the court that respondent was emotionally incapable of exercising his right to allocution (PA 281). The court responded, "Yes, the Court understands," and inquired whether "anyone else care[d] to make a statement" (PA 281). Counsel then asked members of respondent's family if they wished to speak, stating, "I haven't spoken to them, your Honor." (PA 281). Respondent's mother stated to the court that respondent had suffered a concussion several years earlier, that his doctor had not believed that he required psychiatric care as a result although she had thought it necessary, that respondent had been severely burned on one occasion, that he had had a "roof over his head and food in his stomach" during his youth, and that she and her husband had "tried so hard" to provide respondent with a good upbringing (PA 282-86). Respondent's grandmother told the court that she agreed with his mother that "the accident was the beginning of the whole thing," that respondent was "worth rehabilitating, because he's a smart boy," that his younger sister had been "in a bad way" and was living with her, and that she had promised the sister "that we would do everything to keep him alive." (PA 287-91). After hearing this testimony, the court stated that it had "allowed everyone here to have their say," but that it "probably and really [had] made its decision on what was heard in the trial." (PA 297).

6 The cited statute, § 921.141(3), Fla.Stat. (1975), restricted the court to weighing the mitigating factors "as enumerated" in the statutory mitigating roster.

discussed only the statutory mitigating circumstances, two of which -- respondent's age of 18 years and his lack of prior criminal history, § 921.141(6)(a), (g), Fla. Stat. (1975) -- were found by the court (RA 6). The court rejected the evidence of respondent's mental impairment on the ground that it failed to satisfy the statutory standard of a "substantially impaired" capacity, § 921.141(6)(f), Fla.Stat. (1975), as follows:

> (f) . . . [A]lthough there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

(RA 6).[7] The state supreme court, in upholding this rejection of mitigation, concluded that the trial judge "did not ignore or fail to consider the psychological evidence bearing on mitigation," but "[o]bviously" had not been "persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances." (RA 15).

Respondent's petition for writ of habeas corpus alleged, in pertinent part, that his death sentence violated the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), in that he had been denied consideration of nonstatutory mitigation by the restrictive jury instructions and the limited consideration of mitigation by the trial judge (RA 87-88).[8] The en banc Court of Appeals ruled that

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7 The court further found that, while "[t]here is no doubt that the defendant has a history of mental abnormalities which may yet be affecting [him]," such was not of mitigating weight because the "abnormalities only constitute a personality defect," and "a great number, possibly a majority of all persons who commit crimes, also have this or a similar type of personality defect." (RA 7).

8 The Court of Appeals found that these aspects of respondent's claim for relief were not raised in the Supreme Court of Florida prior to that court's affirmance of the death sentence on direct appeal. *Hargrave v. Dugger*, 832 F.2d 1528, 1529-30 (11th Cir. 1987)(en banc). The state supreme court affirmed the sentence on June 30, 1978, three days before the *Lockett* decision was issued by this Court. *Hargrave v. State*, 366 So.2d 1 (Fla. 1978), *cert. denied*, 444 U.S. 919 (1979). Respondent did raise these issues in his post-*Lockett* petition for rehearing in the state court (RA 21-26), which petition the state moved to strike on the ground that it violated Florida procedural rules prohibiting the inclusion of new grounds for review in a rehearing petition (RA 42-45). The petition was denied on February 6, 1979; the court's order states that the motion to strike was rendered moot by the (Cont'd)

"[t]he totality of the circumstances reflect that as in *Hitchcock* [*v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987)], Hargrave's sentencing proceedings did not comport" with the rule of *Lockett v. Ohio*, and that the writ should issue unless the state either affords respondent a new sentencing hearing or imposes a lesser sentence. *Hargrave v. Dugger*, 832 F.2d 1528, 1535 (11th Cir. 1987)(en banc).

In reaching this result, the court first addressed the question whether respondent could establish cause for any state procedural defaults on his claim. *Id.* at 1530-31.[9] The court con-

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denial of the petition (RA 46).

Respondent relitigated his *Lockett* claims in a motion for post-conviction relief filed in the state trial court on September 19, 1980 (RA 53-58). The state court ruled that the claims raised in the motion "were actually litigated on direct appeal or are otherwise inappropriate for a motion to vacate." (RA 76-77). The state supreme court affirmed that ruling on April 2, 1981, holding as follows:

> The [Fla.R.Crim.P.] 3.850 motion asserts a multitude of grounds for relief, from constitutional and non-constitutional error in the guilt phase of the trial to alleged fundamental defects in the sentencing process. The trial court found, and we so hold, that the issues raised by appellant either were or could have been raised on direct appeal, or they involve changes in decisional law not cognizable in a 3.850 motion.

(PA 78-79). *Hargrave v. State*, 396 So.2d 1127, 1128 (Fla. 1981) (citations and footnote omitted).

Respondent thereafter filed a habeas corpus petition on May 6, 1981, in which this claim was raised (RA 86). The district court dismissed the petition, without prejudice, on June 19, 1981, for further exhaustion of state remedies on another of respondent's claims, due to an intervening decision of this Court on that issue (RA 81-82). Exhaustion of state remedies on that claim was completed on March 24, 1983, upon the rendition of the state supreme court's decision affirming the denial of respondent's second post-conviction motion, *Hargrave v. State*, 427 So.2d 713 (Fla. 1983), and the present petition was filed in the district court on that date (RA 83-93).

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The panel opinion in the Court of Appeals had held that the state supreme court had not considered the merits of respondent's claim, see n.8, *supra*, and that respondent had failed to demonstrate cause for his default. *Hargrave v. Wainwright*, 804 F.2d 1182, 1187-90 (11th Cir. 1986), *vacated and en banc rehearing granted*, 809 F.2d 1486 (11th Cir.), *on rehearing*, 832 F.2d 1528 (11th Cir. 1987)(en banc). The en banc opinion states that, "[w]hile a majority, but not all of the judges of this Court might have been inclined to accept the panel's analysis" of the question whether the state court had reached the merits of the claim, recent precedent from the Supreme Court of Florida "raises a serious doubt as to whether it would now hold there to be a procedural default under the circumstances of this case," leaving open "the question of the position of the federal court in a case (Cont'd)

cluded that *Lockett v. Ohio* was "the articulation of a constitutional principle that had not been previously recognized," that, "at the time of Hargrave's trial and appeal, there were no federal decisions which should have alerted Hargrave's attorney to the possibility of a challenge based on exclusion of non-statutory mitigating circumstances,"[10] and that Florida law, as it existed at that time, "could be construed to be directly contrary" to the subsequently-announced rule of *Lockett*. *Id.* at 1530-33.[11] Based

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where the Florida courts had enforced a procedural default, but under later law would not." *Hargrave v. Dugger*, 832 F.2d at 1530 (citation omitted). However, the court stated that this question would not be addressed "because, unlike the panel, we hold that Hargrave has shown cause for default and actual prejudice sufficient to require a federal review of his constitutional claim on the merits." *Ibid.*

The only member of the court below who did not join in Chief Judge Roney's opinion for the en banc court was Judge Tjoflat, the author of the panel opinion. In a special concurring opinion, Judge Tjoflat stated that cause-and-prejudice analysis was unnecessary to permit review of the merits of respondent's claims because subsequent state-law precedent made it clear that the Florida courts no longer enforced a procedural-default rule on such claims. *Id.* at 1535-39 (Tjoflat, J., specially concurring).

10 In analyzing then-extant federal law, the court looked first to *Proffitt v. Florida*, 428 U.S. 242 (1976), which had issued during the pendency of respondent's direct appeal. *Hargrave v. Dugger*, 832 F.2d at 1531. The court noted that this Court in *Proffitt*, while "squarely" holding that the Florida courts could not consider nonstatutory aggravating circumstances, "did not suggest that a limitation on *mitigating* circumstances might be unconstitutional," characterized Florida law as being that "the decision to impose the death penalty 'turned upon whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist,'" stated that Florida trial judges were "'directed to weigh the statutory aggravating and mitigating circumstances'" in determining the sentence to be imposed, and "described the trial court's function as that of weighing 'eight aggravating factors against seven mitigating factors.'" *Id.* at 1531 (citing *Proffitt v. Florida*, 428 U.S. at 246, 250, 251)(emphasis by the court). Based upon these statements, the court found that "*Proffitt* contains no direct statement or inference that, as a matter of federal constitutional law, the statutory list of mitigating circumstances should be considered nonexclusive." *Ibid.*

The en banc court also looked to the companion cases decided contemporaneously with *Proffitt*, and found them to "shed no light on this issue." *Ibid* (citation omitted). Finally, the court found that "there is a dearth of federal cases decided prior to or during Hargrave's trial and appeal which address Florida's post-*Furman* [*v. Georgia*, 408 U.S. 238 (1972)] capital statute." *Hargrave v. Dugger*, 832 F.2d at 1531.

11 In examining Florida law, the court looked first to *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974); it concluded that the state court, in that case, "did not explicitly state that the statutory list was exclusive but it treated the statutory mitigating circumstances as if they were the only factors which could be considered," and that the Florida (Cont'd)

upon these findings, the court held that "a successful claim based on exclusion of non-statutory mitigating circumstances was unavailable under federal and Florida law preceding *Lockett*,"[12] and that, "[s]ince Hargrave 'lacked the tools to construct [his] constitutional claim,' *Engle* [*v. Isaac*, 456 U.S. 107, 133 (1982)], his failure to object to the judge's consideration only of statutory mitigating circumstances at the sentencing hearing and on appeal to the Florida Supreme Court must be excused" under the rule of *Reed v. Ross*, 468 U.S. 1 (1984). *Hargrave v. Dugger*, 832 F.2d at 1531, 1533.

In concluding that respondent had demonstrated actual prejudice, the court ruled as follows:

> We also hold that Hargrave would suffer actual prejudice if his *Lockett* claim were found to be procedurally barred. The State argues that Hargrave cannot establish preju-

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court, in subsequent decisions, had "continued to treat the statutory list as exclusive without explicitly so holding." *Hargrave v. Dugger*, 832 F.2d at 1532 (citations omitted). The court then discussed *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977), decided during the pendency of respondent's appeal, and found that the state court had therein "stated that the only factors relevant to sentencing under the Florida statute were the statutory aggravating and mitigating circumstances." *Hargrave v. Dugger*, 832 F.2d at 1532. While noting that the Florida court, post-*Lockett*, had ruled that "the introduction of nonstatutory mitigating evidence had never been precluded in Florida," *ibid* (citing *Songer v. State*, 365 So.2d 696, 700 (Fla. 1978)(on rehearing), *cert. denied*, 441 U.S. 956 (1979)), the court below recognized the state court's acknowledgement that "its law could have been misconstrued," and concluded that, "[a]t the time Hargrave filed his appellate brief in state court, *Cooper* was prevailing precedent." *Id.* at 1532-33.

12 The court noted that this conclusion was in harmony with its own precedent:

> In light of these developments in the law, both state and federal, this Court has previously recognized the practical unavailability of a *Lockett* claim at the very time at issue in this case. This Court has described *Lockett* as a "direct reversal" of Florida mitigating circumstances law, and expressly held, with regard to a 1975 trial:
>
> > [The] trial occurred in 1975, one year before *Cooper* and three years before *Lockett*. It would be difficult to characterize the *Lockett* claim as "available" during petitioner's trial . . . .

*Id.* at 1532-33 (citing *Sullivan v. Wainwright*, 695 F.2d 1306, 1311 (11th Cir.), *cert. denied*, 464 U.S. 922 (1983), *Ford v. Strickland*, 696 F.2d 804, 182 (11th Cir.)(en banc), *cert. denied*, 464 U.S. 865 (1983), and *Foster v. Strickland*, 707 F.2d 1339, 1347 (11th Cir. 1983), *cert. denied*, 466 U.S. 993 (1984)).

> dice because claims such as his have been rejected many times by this Court . . . .[13]
>
> Since these decisions were rendered, however, the United States Supreme Court handed down its decision in *Hitchcock v. Dugger*, [citation omitted]. In this case, the Supreme Court overturned a death sentence imposed on a Florida defendant based on a *Lockett* claim similar to Hargrave's. *Hitchcock* has breathed new vitality into claims based on the exclusion of non-statutory mitigating factors, and Hargrave would be prejudiced if he were not now allowed to raise such a claim.

*Id.* at 1533 (citations omitted).

On the merits of respondent's claims, the court held that, "[l]ooking at the record in the instant case, it is clear that this case is so similar to *Hitchcock* that the cases must reach the same result." *Ibid.* The court first found that "evidence in mitigation which did not fit within the confines" of the statutory roster was introduced, *i.e.*, "[respondent's] steady employment, below-average intelligence, and history of drug abuse," and that the two mental-health experts who testified at the hearing, "while differing as to whether petitioner's mental condition satisfied the statutory mitigating circumstances, did agree that [respondent] suffered from a significant degree of mental and emotional impairment." *Id.* at 1534. The court next found that the jury instructions in the present case were similar to those in *Hitchcock*, and further, that "[t]here is other evidence in this case that the jury and sentencing judge limited their consideration of mitigating circumstances to those enumerated in the statute," citing to counsel's colloquy with the court regarding the presentence investigation, the court's statements prior to reading its sentencing order, and the court's refusal to consider mental-impairment evidence which did not satisfy the statutory standard. *Id.* at 1534-35. Based upon these considerations, the court below concluded that respondent's "sentencing proceedings did not comport" with the principles established in *Lockett v. Ohio*. *Id.* at 1535.

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[13] Petitioners' argument on prejudice was that "[t]he identical argument presented herein was made and rejected" by the Eleventh Circuit in a line of pre-*Hitchcock* decisions (RA 136-40).

## REASONS FOR NOT GRANTING THE WRIT

**THE ELEVENTH CIRCUIT'S APPLICATION OF THIS COURT'S PROCEDURAL-DEFAULT PRECEDENT TO HOLD THAT A CLAIM BASED UPON *LOCKETT V. OHIO*, 438 U.S. 586 (1978), WAS NOT REASONABLY AVAILABLE IN 1975 IN FINDING CAUSE FOR ANY STATE PROCEDURAL DEFAULTS, AND THAT COURT'S CONCLUSION THAT RESPONDENT HAD ESTABLISHED ACTUAL PREJUDICE, ARE NOT IN CONFLICT WITH THIS COURT'S DECISIONS REQUIRING CAUSE AND ACTUAL PREJUDICE FOR FEDERAL HABEAS REVIEW OF PROCEDURALLY-DEFAULTED CONSTITUTIONAL CLAIMS.**

Petitioners' central thesis is that the Eleventh Circuit held in this case that *Hitchcock v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987), constitutes "new law" under *Reed v. Ross*, 468 U.S. 1 (1984). Petition for Writ of Certiorari (hereinafter "Petition") at 12-19. This is plainly not so: what the court held is that a claim based upon this Court's 1978 decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), "was unavailable under federal and Florida law preceding *Lockett*," and that, since respondent, at the time of his 1975 trial, "'lacked the tools to construct [his] constitutional claim,' his failure to object to the judge's consideration only of statutory mitigating circumstances . . . must be excused" under *Ross*. *Hargrave v. Dugger*, 832 F.2d 1528, 1531, 1533 (11th Cir. 1987)(en banc)(citation omitted).[14] Thus, peti-

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14 In addressing cause, the court below bypassed the question whether an actionable default should have been found in the first instance. *Hargrave v. Dugger*, 832 F.2d at 1530. The court noted that the Florida Supreme Court had recently held that a capital defendant who was sentenced to death in a pre-*Lockett* trial "was not procedurally barred from presenting his *Lockett* claim in state habeas corpus proceedings where the issue had not been previously litigated on direct appeal or in the petitioner's first post-conviction challenge to the sentence," *ibid* (citing *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987)), and that this ruling "raises the question of the position of the federal court in a case where the Florida courts had enforced a procedural default, but under later law would not." *Ibid*. However, the court found it unnecessary to reach this question in light of its conclusion that respondent had demonstrated cause for any default and actual prejudice. *Hargrave v. Dugger*, 832 F.2d at 1530.

In the *Riley* case, the Supreme Court of Florida held that this Court's decision in *Hitchcock* had overruled state law on mitigating-circumstance error, and that the petitioner in that case, who had first raised a *Lockett* claim in a habeas corpus petition after unsuccessful direct appellate and post-conviction litigation, was not procedurally barred from presenting the claim. 517 So.2d at 659-60. Shortly after the issuance of that decision, the state court more explicitly ruled that *Hitchcock* constitutes a "change of law" cognizable in Florida post-conviction proceedings under the rule of *Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980), as follows:

(Cont'd)

tioners' argument that "*Hitchcock* did not create new law as envisioned in *Reed v. Ross*," Petition at 19, attacks a proposition never advanced by respondent or passed upon by the Eleventh Circuit.

To the extent that petitioners' argument can be construed as a challenge to the court's holding that *Lockett* claims were "unavailable," within the meaning of *Reed v. Ross*, at the time of respondent's trial and appeal, no basis is set forth for review of the decision below. Petitioners assert that mitigating-circumstance claims "rest[ed] in the percolating waters of evolving legal theory," and were "[susceptible] to challenge" at the time of respondent's trial, Petition at 19-20, while utterly ignoring the examination of controlling state and federal law set forth by the court below.

As the court noted, the appropriate point of departure, in

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> We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in the law that potentially affects a class of petitioners . . . to defeat the claim of a procedural default.

*Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987). The Florida court has consistently adhered to this holding. *Ford v. State*, Nos. 70,467 & 70,793 (Fla. Feb. 18, 1988); *Combs v. State*, No. 68,477 (Fla. Feb. 18, 1988); *Waterhouse v. State*, Nos. 69,557 & 70,459 (Fla. Feb. 11, 1988); *Mikenas v. Dugger*, No. 71,129 (Fla. Jan. 21, 1988); *Booker v. Dugger*, No. 70,928 (Fla. Jan. 14, 1988); *Foster v. State*, 518 So.2d 901 (Fla. 1987); *Demps v. Dugger*, 514 So.2d 1092 (Fla. 1987); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Delap v. Dugger*, 513 So.2d 659 (Fla. 1987).

Thus, it is the Supreme Court of Florida, and *not* the Eleventh Circuit, that has construed *Hitchcock* as undoing previously-existing procedural bars. It is, of course, for the state courts to determine the proper scope of their procedural bars, *e.g.*, *County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979), and the Florida court was free to interpret its state-law ruling in *Witt v. State* as permitting *Hitchcock*-type challenges to be raised without regard to prior defaults. However, as is suggested by the concurring opinion of Judge Tjoflat in the present case, "since the Florida courts have affirmatively indicated that they will not apply procedural default to *Lockett* claims," the federal courts "show no disrespect" by doing the same. *Hargrave v. Dugger*, 832 F.2d at 1539 (Tjoflat, J., specially concurring). Following this lead, the Eleventh Circuit has recently addressed the question left open in this case, and has squarely held that the absence of a state procedural bar to consideration of *Lockett* claims eliminates a federal court's obligation to enforce any such asserted bar. *Messer v. Florida*, 834 F.2d 890, 892-93 (11th Cir. 1987); *Armstrong v. Dugger*, 833 F.2d 1430, 1435-36 (11th Cir. 1987).

terms of an analysis of federal constitutional law,[15] is *Proffitt v. Florida*, 428 U.S. 242 (1976), which was decided during the pendency of respondent's appeal. *Hargrave v. Dugger*, 832 F.2d at 1531. The court discussed *Proffitt* as follows:

> In *Proffitt*, the Supreme Court upheld Florida's death penalty statute and, in so doing, the Court squarely held that a sentencer could not consider non-statutory *aggravating* circumstances. *Proffitt*, however, did not suggest that a limitation on *mitigating* circumstances might be unconstitutional.
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> Indeed, in *Proffitt*, the Court stated that the decision whether to impose the death penalty "turned upon whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist." Later, the Court stated that the "trial judge is . . . directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed." Also, the Court described the trial court's function as that of weighing "eight aggravating factors against seven mitigating factors."
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> In short, *Proffitt* contains no direct statement or inference that, as a matter of federal constitutional law, the statutory list should be considered nonexclusive. . . .

*Id.* at 1531 (citations omitted; emphasis by the court).[16]

Of the cases that this Court decided with *Proffitt*, only *Woodson v. North Carolina*, 428 U.S. 280 (1976), provided even the vaguest support for a challenge to limited consideration of miti-

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15 At the time of respondent's trial and appeal there were, as found by the court below, no federal court of appeals cases addressing Florida's capital-punishment statute. *Hargrave v. Dugger*, 832 F.2d at 1531.

16 In *Lockett*, it is conceded that "[t]he signals from this Court have not . . . always been easy to decipher." *Id.* at 602. Discussing its approval of the Florida statute in *Proffitt*, the Court noted that "six Members of this Court assumed . . . that the range of mitigating factors listed in the statute was not exclusive." *Id.* at 606 (footnote omitted)(citing *Proffitt v. Florida*, 428 U.S. at 250 n.8). *But see id.* at 629-30 (Rehnquist, J., dissenting)(plurality in *Proffitt*, in analyzing Florida's sentencing structure, had believed that the sentencer would weigh statutory aggravating and mitigating factors in imposing sentence); *Jurek v. Texas*, 428 U.S. 262, 271-72 (1976)(*Proffitt* held constitutional "a system that directs the judge and advisory jury to consider *certain enumerated mitigating circumstances*")(emphasis supplied). In any event, *Proffitt* did *not* hold that mitigating circumstances were *required* to be unlimited, and any assumption in which the Court may have engaged was proven wrong only a few days after *Proffitt* issued, when the state supreme court decided *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977). See pp.15-17, *infra*.

gation.[17] However, while *Woodson* established that a death-penalty statute cannot be mandatory and must allow for consideration of "relevant facets" in mitigation, 428 U.S. at 303-04, the Court "did not attempt to indicate . . . which facets of an offender or his offense it deemed 'relevant' in capital sentencing or what degree of consideration of 'relevant facets' it would require." *Lockett v. Ohio,* 438 U.S. at 604 (citation omitted). "[T]hose questions" were answered, for the first time, by the decision in *Lockett, id.* at 604-05, and the Eleventh Circuit properly concluded that *Woodson* "shed no light on this issue." *Hargrave v. Dugger,* 832 F.2d at 1531.[18]

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17 *Woodson* was decided one year after respondent's trial. If, as petitioners contended in the Court of Appeals (RA 114), the critical procedural default in this case was the failure of respondent's counsel to raise a *Lockett* claim at trial, in that this default absolutely barred *any* review on direct appeal, *Woodson* provides no support whatsoever for the proposition that respondent's claim was reasonably available.

18 Petitioners' suggestion that *Woodson* established a reasonable basis for a *Lockett* challenge prior to 1978, Petition at 19 & n.4, is thus refuted by *Lockett* itself. The other decisions upon which petitioners rely for the proposition that such challenges were available to respondent, *Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S. 51 (1937), and *McGautha v. California,* 402 U.S. 183 (1971), Petition at 19 & n.4, although cited by this Court in *Lockett,* 438 U.S. at 598, 602-03, did not support in any manner an Eighth Amendment attack on limited mitigation in capital sentencing proceedings.

In *Ashe,* this Court rejected an equal-protection challenge to a state escape statute pursuant to which the permissible sentence was the term that the prisoner was serving at the time of the escape. 302 U.S. at 53-55. In discussing the wide latitude afforded the states in sentencing matters, the Court noted that, "[s]ave as limited by constitutional provisions safeguarding individual rights, a State may choose means to protect itself and its people against criminal violation of its laws," *id.* at 55. The Court continued, in the portion of the decision upon which petitioners rely, to state that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Id.* at 55 (citations omitted). Nothing in this statement even suggested that Eighth Amendment strictures required such consideration; indeed, as is specifically stated in *Lockett* -- in citing to *Ashe* -- "individualized sentencing" in criminal cases had not previously been recognized as "constitutionally required." *Lockett v. Ohio,* 438 U.S. at 602. *McGautha v. California* only reinforces this point. There, this Court rejected claims that due process required the states to adopt standards for capital sentencing and to provide for bifurcated trials, 402 U.S. at 200-22, and specifically *declined* to determine "whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." (Cont'd)

The court then proceeded to examine state law, prior to the advent of *Lockett*, with particular attention to the decisions of the Supreme Court of Florida in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), and *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977).[19]

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*Id.* at 218-19.

To be sure, the language in *Ashe* is consistent with the constitutional rule announced in *Lockett*. But even if that language, or words used by this Court in any of the decisions relied upon by petitioners, could be construed as providing a modicum of support for a *Lockett* challenge prior to 1978, such would not defeat the holding of the court below; *Reed v. Ross* simply does not require a blank slate for a finding of cause. Rather, there must have been "a reasonable basis upon which [respondent] could have *realistically* appealed his [sentence]," *id.* at 19 (emphasis supplied), and the decisions upon which petitioners rely do nothing to defeat the holding of the court of appeals. *Id.* at 18-19 (burden-of-proof claim not reasonably available in pre-*In re Winship*, 397 U.S. 358 (1970), trial, although decisions of one federal court and one state court provided "indirect support" for claim).

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The then-governing statute, Section 921.141, Florida Statutes (1975), provided in pertinent part as follows:

> (2) ADVISORY SENTENCE BY THE JURY. - After hearing all the evidence, the jury shall deliberate and return an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist *as enumerated* in subsection [5];
> (b) Whether sufficient mitigating circumstances exist *as enumerated* in subsection [6], which outweigh the aggravating circumstances found to exist; and
> (c) *Based on these considerations*, whether the defendant should be sentenced to life [imprisonment] or death.
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
> (a) That sufficient aggravating circumstances exist *as enumerated* in subsection [5], and
> (b) That there are insufficient mitigating circumstances, *as enumerated* in subsection [6], to outweigh the aggravating circumstances.
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact *based upon the circumstances in subsections* [5] *and* [6] and upon the records of the trial and sentencing proceedings. . . .

§ 921.141(2)(3), Fla.Stat. (1975)(emphasis supplied).

(Cont'd)

The court found as follows:

> Nor should Hargrave's attorney have been alerted to the possibility of a *Lockett* claim by decisions from the Florida courts. In *State v. Dixon*, [citation omitted] the Florida Supreme Court did not explicitly state that the statutory list was exclusive but it treated the statutory mitigating circumstances as if they were the only factors which could be considered. After *Dixon*, the Florida courts continued to treat the statutory list of mitigating factors as exclusive without explicitly so holding.[20]
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> Finally, in *Cooper v. State*, [citation omitted], decided during the pendency of Hargrave's appeal, the Supreme Court of Florida seemed to make explicit the exclusivity of the statutory mitigating factors . . . . The Supreme Court of Florida stated that the only factors relevant to sentencing were the statutory aggravating and mitigating circumstances . . . .

*Hargrave v. Dugger*, 832 F.2d at 1532 (citations omitted). The court did note that the Supreme Court of Florida had ruled, post-*Lockett* (and after it had upheld respondent's sentence), that "the introduction of nonstatutory mitigating evidence had never been precluded in Florida," *ibid* (citing *Songer v. State*, 365 So.2d 696, 700 (Fla. 1978)(on rehearing), *cert. denied*, 441 U.S.

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Section 921.141(2)(b) and (3)(b) were amended after *Lockett* to delete the restriction that mitigating circumstances be limited to those "enumerated" in the statute. Ch. 79-353, Laws of Fla. (1979). This Court has acknowledged the post-*Lockett* revisions of the Florida death-penalty statute, and specifically, these changes from provisions directing "the sentencer to determine whether statutory aggravating circumstances are outweighed by statutory mitigating circumstances" to the current provisions directing "the sentencer to determine whether statutory aggravating circumstances are outweighed by any mitigating circumstances." *Spaziano v. Florida*, 468 U.S. 447, 451 n.4 (1984); *see Hitchcock v. Dugger*, 107 S.Ct. at 1823 (noting that Florida legislature, post-*Lockett*, "removed the phrase 'as enumerated [in the statutory list]" from the provisions requiring the advisory jury and the sentencing judge to consider mitigating circumstances")(citation omitted). *See also Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983)(Stevens, J., concurring).

20 In three post-*Dixon* decisions that predated respondent's trial, the Florida court strongly endorsed limited consideration of mitigating circumstances. *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975)("the most important safeguard provided by [the statute] is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed"), *cert. denied*, 428 U.S. 912 (1976); *Hallman v. State*, 305 So.2d 180, 181 (Fla. 1974)(death sentence upheld where trial judge entered findings "specifically delineating the aggravating and mitigating circumstances pursuant to the safeguards afforded by Section 921.141"), *cert. denied*, 428 U.S. 911 (1976); *Taylor v. State*, 294 So.2d 648, 651 (Fla. 1974)(death sentence reversed where record indicated judge may not have considered "mitigating circumstances enumerated by the statute and found in the record").

956 (1979), but that the state court "has acknowledged that its law could have been misconstrued." *Ibid.*[21]

Based upon this examination of the state of the law prior to 1978, the court concluded:

> In light of these developments in the law, both state and federal, this Court has previously recognized the practical unavailability of a *Lockett* claim at the very time at issue in this case. This Court has described *Lockett* as a "direct reversal" of Florida mitigating circumstances law, and expressly held, with regard to a 1975 trial:
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> > [The] trial occurred in 1975, one year before *Cooper* and three years before *Lockett*. It would be difficult to characterize the *Lockett* claim as "available" during petitioner's trial . . . .
>
> At the time Hargrave filed his appellate brief in state court, *Cooper* was prevailing precedent. As this Court has noted on several occasions, *Cooper* could be construed to be directly contrary to the United States Supreme Court's later decision in *Lockett*. Since Hargrave "lacked the tools to construct [his] constitutional claim," his failure to object to the judge's consideration only of statutory mitigating circumstances at the sentencing hearing and on appeal to the Florida Supreme Court must be excused. We thus conclude that Hargrave had cause for his default.

*Id.* at 1532-33 (citations omitted).

This decision is a faithful application of the *Reed v. Ross* rule that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with ap-

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[21] While eschewing any concession that the pre-*Lockett* statute had limited mitigating circumstances to the statutory factors, the Florida court has repeatedly recognized that, in pre-*Lockett* trials, "our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." *Harvard v. State*, 486 So.2d 537, 539 (Fla.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 215 (1986)(citations omitted) (granting post-conviction relief to defendant convicted in 1975 trial where trial counsel and sentencing judge believed mitigation limited to statutory factors); *see Lucas v. State*, 490 So.2d 943, 946-47 (Fla. 1986)(reversing 1977 death sentence because trial judge limited consideration of mitigation to statutory circumstances); *Muhammad v. State*, 426 So.2d 533, 538 (Fla. 1982), *cert. denied*, 464 U.S. 865 (1983)(refusing to find counsel ineffective in pre-*Lockett* trial for failure to present nonstatutory mitigating evidence because argument "presupposes that counsel was expected to predict the decision in *Lockett*"); *Perry v. State*, 395 So.2d 170, 174 (Fla. 1980)(reversing pre-*Lockett* sentence for exclusion of nonstatutory evidence ruled inadmissible under *Cooper* and recognizing that trial judge had "followed the law as he believed it was being interpreted at the time of the trial").

plicable state procedures." 468 U.S. at 16.[22] Petitioners have utterly failed to identify any conflict of authority engendered by this holding, or any other basis for reviewing the finding of cause by the Eleventh Circuit.

As their second reason for granting the writ, petitioners urge that the court below "has confused what constitutes cause for failing to raise a *Hitchcock* claim, and the actual prejudice necessary to prevail," Petition at 13, and faults the court's "complete elimination of the prejudice prong" of *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *United States v. Frady*, 456 U.S. 152 (1982). Petition at 25. This argument is refuted on the face of the Eleventh Circuit's opinion.

Petitioners argued below, as their sole response on the question of prejudice, that "[t]he identical argument presented herein was made and rejected" by the Eleventh Circuit in a line of pre-*Hitchcock* decisions (RA 136-40). Rejecting this argument, the court ruled as follows:

> We also hold that Hargrave would suffer actual prejudice if his *Lockett* claim were found to be procedurally barred. The State argues that Hargrave cannot establish prejudice because claims such as his have been rejected many times by this Court . . . .
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> Since these decisions were rendered, how-

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22 Petitioners' suggestion that *Adams v. Dugger*, 804 F.2d 1526 (11th Cir. 1986), *modified on rehearing*, 816 F.2d 1493 (11th Cir. 1987), *cert. granted*, ___ U.S. ___ (Mar. 7, 1988), is a "similarly postured case," Petition at 13-14 & n.2, on the question of cause is incorrect. In *Adams*, the court of appeals permitted a challenge based upon *Caldwell v. Mississippi*, 472 U.S. 320 (1985), to be presented in a successive habeas corpus petition, 816 F.2d at 1495-96, and further ruled that if there had been any actionable state default on that claim, the petitioner had established cause for such default under *Reed v. Ross*, upon a finding that *Caldwell* claims were not reasonably available prior to 1985. *Id.* at 1497-1500.

In attacking this second holding on certiorari, the State of Florida raised, as its primary challenge, that the Eleventh Circuit's ruling is in direct conflict with decisions of the Supreme Court of Florida which hold that *Caldwell* is not a "change of law" which can be raised in the first instance on a collateral attack. Petition for Writ of Certiorari at 12-17, *Dugger v. Adams*, No. 87-121 (1987). No such argument can be raised with regard to the *Lockett* issue presented in this case; as has been set forth in this brief, the Eleventh Circuit and the Supreme Court of Florida are in complete harmony on the question whether *Lockett* claims arising from pre-1978 capital cases can be presented for the first time in collateral-attack proceedings. See n.14, *supra*.

> ever, the United States Supreme Court handed down its decision in *Hitchcock v. Dugger*, [citation omitted]. In this case, the Supreme Court overturned a death sentence imposed on a Florida defendant based on a *Lockett* claim similar to Hargrave's. *Hitchcock* has breathed new vitality into claims based on the exclusion of non-statutory mitigating factors, and Hargrave would be prejudiced if he were not now allowed to raise such a claim.

*Hargrave v. Dugger*, 832 F.2d at 1533 (citations omitted). It is thus manifest that the court was fully aware of its obligation under this Court's precedent to resolve the question of actual prejudice once cause for state default was found.[23]

Finally, in their only attack on the merits ruling below, petitioners claim that "guidance as to the applicability of [the] harmless error doctrine" is mandated, lest the court of appeals and the state supreme court "continue to misapply" *Hitchcock* without regard for that doctrine. Petition at 26. However, contrary to petitioners' assertion, the decisions of the Eleventh Circuit, as well as those of the Supreme Court of Florida, on this issue readily evidence awareness of the responsibility to apply the harmless error doctrine. *Compare Messer v. Florida*, 834 F.2d at 894-95 (11th Cir. 1987)(new sentencing required where non-statutory mitigation introduced, instructions prevented jury from considering such mitigation and trial court failed to consider mitigation outside statutory limits) *with Clark v. Dugger*, 834 F.2d 1561, 1569-70 (11th Cir. 1987)(instructional error harm-

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23 Prior to the decision in this case, the controlling standard in the Eleventh Circuit for actual prejudice in cases involving jury instructions challenged as violative of *Lockett* was established by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.)(en banc), *cert. denied*, 464 U.S. 865 (1983), as "whether [the petitioner] has carried his burden in establishing that his jury perceived that in deciding whether to recommend life or death, it was denied the use of any nonstatutory mitigating factors," with the "entire charge . . . examined as a whole" and the trial court's treatment of mitigating circumstances also considered in the inquiry. *Id.* at 812-13. This standard was urged upon the court below by petitioners in their argument on prejudice (RA 137-39). While petitioners, in light of their paltry argument on prejudice before the Eleventh Circuit, can hardly fault the court's abrupt treatment of the issue, it bears notice that, in its evaluation of the merits of respondent's claim, the court below carefully examined all jury instructions, the record statements of the trial judge, the trial judge's treatment of mitigation, and the ruling of the state supreme court on direct appeal before determining that respondent's sentencing proceeding "did not comport" with *Lockett*. *Hargrave v. Dugger*, 832 F.2d at 1534-35.

less where defendant "failed to produce evidence of any nonstatutory mitigating factors"); *compare Nikenas v. Dugger*, No. 71,129 (Fla. Jan. 21, 1988)(instructional error not harmless where significant nonstatutory mitigation introduced) *with White v. Dugger*, No. 71,184 (Fla. Jan. 28, 1988)(instructional error harmless where proffered nonstatutory mitigation "would conclusively have had no effect" upon the advisory verdict). As for petitioners' alternative request that the cause be remanded for a harmless error inquiry, Petition at 27-28, it cannot go unnoticed that petitioners never argued in the court below that the errors in this case were harmless (RA 137-40, 146-47). Furthermore, with the instructional error and limited consideration of mitigation by the state trial and appellate courts unchallenged,[24] and with the presentation of significant non-statutory mitigation consistently conceded, both in the court below (RA 140, 144) and before this Court, Petition at 24 n.6, and specifically found by the Court of Appeals, *Hargrave v. Dugger*, 832 F.2d at 1534, petitioners' request for a remand on harmless error is utterly without merit.

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[24] Petitioners do not attack the court's conclusion that the jury and judge in this case were denied the use of nonstatutory mitigating factors, in violation of *Lockett*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Hitchcock v. Dugger*.

## CONCLUSION

Based upon the foregoing, respondent requests this Court to deny the petition for writ of certiorari in this cause.

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